No. 12691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDEMNITY COMPANY, a corporation,

Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Jurisdiction.

1. The statutory provisions to sustain the jurisdiction of the District Court are U. S. Code, Title 28, Sec. 1332 (formerly the Act of Mar. 3, 1875, Chap. 137, Sec. 1, 18 Stat. 470, as amended; 28 U. S. C. A., Sec. 41(1)) providing that the "district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 . . . and is between: (1) citizens of different states; . . ."

The statutory provisions to sustain the removal of the within case from the State Court to the District Court are U. S. Code, Title 28, Sec. 1441(a) (formerly the Act of Mar. 3, 1911, Chap. 231, Secs. 28 and 53, 36 Stats. 1094, 1101; 28 U. S. C. A. Secs. 71 and 114, 1940 Edition) providing that "except as otherwise expressly

provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the District Court of the United States for the district and division embracing the place where such action is pending."

2. The existence of the jurisdiction is shown by the following allegations in the affidavit of M. J. Rhew, Manager of the Royal Indemnity Company: "That defendant Royal Indemnity Company is a non-resident of the State of California and is a corporation organized under the laws of the State of New York. That plaintiff was at the time of bringing said suit, and still is, a resident and citizen of the State of California. That the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00). That the said suit is of a civil nature, namely, an action for breach of contract and the controversy in this action is wholly between citizens of different states." [R. 3-4.]

3. The statutory provisions to sustain the jurisdiction of the Court of Appeals are U. S. Code, Section 1291 (formerly the Act of Mar. 3, 1891, Chap. 517, Sec. 6, 26 Stat. 828, as amended; 28 U. S. C. A., Sec. 225(a)) providing that the "court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ;" and U. S. Code, Section 1294 (formerly the Act of Mar. 3, 1891, *supra;* 28 U. S. C. A., Sec. 225(d)) providing that "appeals from reviewable decisions of the district . . . (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . ."

STATEMENT OF THE CASE.

Pleadings.

This is an appeal by Royal Indemnity Company, a New York corporation, and the defendant below, from a summary judgment.

On or about the 3rd day of January, 1950 [R. 62] the Appellee George N. Olmstead filed an amended complaint against Royal Indemnity Company, a corporation, in the District Court of the United States, Southern District of California, Central Division, for money purportedly due on an insurance policy.

In the first cause of action of said amended complaint, appellee alleged that:

> Prior to April 9, 1946, Harry E. Blodgett did business in the County of Los Angeles, State of California under the fictitious firm name of "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" in the renting for hire of passenger automobiles or drive-yourself passenger vehicles. [Par. III, Amended Complaint, R. 7.]

> On or about February 15, 1946, Harry E. Blodgett died and shortly thereafter Roy R. Jordan was duly appointed the executor of his estate and testamentary trustee under the last will and testament of the said Harry E. Blodgett. [Pars. IV and V, Amended Complaint, R. 7.]

> Roy R. Jordan conducted the said business in the City of Pasadena, County of Los Angeles, State of California and rented vehicles in the said City with said vehicles to be used on the public streets of the said City, County and State. [Par. VI, Amended Complaint, R. 8.]

The said business was operated under the terms of the ordinance of the City of Pasadena known as Ordinance No. 3041 entitled "An Ordinance of the City of Pasadena, Regulating the Operation of Certain Motor Propelled Vehicles, Drive-Yourself Vehicles, Vehicles Transporting Passengers for Compensation or for Sightseeing Purposes upon the Public Streets and Prescribing Penalties for the Violation thereof." [Par. VII, Amended Complaint, R. 8.]

Appellee further alleged that:

A written insurance contract, issued by Royal Indemnity Company and dated February 16, 1946, was required by the aforesaid ordinance, and was applied for, and said ordinance was, at all times mentioned herein, a part of the terms, covenants and agreements of said insurance contract. That said contract was caused to be filed with the City of Pasadena. The said City issued a municipal permit under Section 2(a) and 4(c) of said ordinance to the said Blodgett for the conducting of said business. [Par. VII, Amended Complaint, R. 8-9.]

Prior to April 9, 1946, the defendant Royal Indemnity Company entered into a "Comprehensive Liability Policy" with the estate of Harry E. Blodgett and Roy R. Jordan. [Par. VIII, Amended Complaint, R. 9.] (A copy of the said contract was annexed to the said Amended Complaint as Exhibit "A" and was incorporated therein by reference. Exhibit "A" appears on pages 16 to 62 of the Record.)

A Packard automobile was scheduled in said insurance contract and was an asset of the estate of Harry E. Blodgett. [Par. VIII, Amended Complaint, R. 9.]

Said insurance contract provided that said Royal Indemnity Company guaranteed payment to a judgment creditor for that part of said judgment which

is within the amounts expressed in said policy, agreed to and would be liable for damage to property or the injury to any person, agreed with the insured to pay on behalf of the insured all sums which the insured shall become obligated to pay for damages because of bodily injury or injury to or destruction of property sustained by any person caused by accident, and would insure against liability from bodily injury or destruction of property or damage to property or for injury to any person or persons caused by and arising out of or resulting from negligence in the use, operation or ownership of the automobiles scheduled in said policy by any person operating said vehicle with permission of the owner. That said contract further provided that Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the Estate of Harry E. Blodgett, deceased, or Roy R. Jordan as said executor or trustee, or any other person sustaining negligent injury, or whose property is negligently damaged became a judgment creditor, was protected by said contract. Further that said contract provided that said Royal Indemnity Company shall defend in the name and on behalf of any suit against the insured. [Par. VIII, Amended Complaint, R. 10.]

Prior to April 9, 1946, Roy R. Jordan rented in the City of Pasadena, County of Los Angeles, State of California, the aforesaid Packard automobile to Sam Richardson. That said automobile was in his possession with the consent of Roy R. Jordan on April 9, 1946. [Par. IX, Amended Complaint, R. 11.]

Sam G. Richardson on April 9, 1946, drove, operated and used said Packard automobile with the permission and consent of Blodgett or Roy R. Jordan

as said executor. [Par. X, Amended Complaint, R. 11.]

Appellee on April 9, 1946, in the County of Los Angeles, State of California, sustained bodily injuries and suffered property damages in a collision accident at which time Richardson negligently drove the aforesaid Packard automobile into and upon appellee; and appellee thereafter through his guardian *ad litem,* commenced and prosecuted an action for damages for personal injuries and property damage against the said Richardson, in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 516890. That thereafter the court in said case signed Findings of Fact and Conclusions of Law, wherein the court found appellee had been damaged on account of said bodily personal injuries in the amount of $25,000.00, and that appellee's estate and property was injured, wasted, destroyed, taken or carried away on account of expenses in the sum of $4,357.00 and on account of loss of earnings in the sum of $1,643.00. That appellee obtained judgment against said Richardson on the 12th day of September, 1946, in the sum of $31,000.00, together with interest thereon at 7% per annum until paid, together with appellee's costs in the sum of $14.00. That said judgment has become and is now final. [Par. XI, Amended Complaint, R. 11-12.]

Appellant had prior to June 27, 1946, notice of said collision accident and time, place and circumstances thereof, and that claims were made on behalf of, and that suit was filed by the appellee for damage sustained by reason of negligence on the part of Richardson in operating said Packard vehicle rented from and operated with the consent of Harry E. Blodgett. [Par. XIII, Amended Complaint, R. 13.]

Appellant at no time notified Sam R. Richardson that said contract of insurance insured him pursuant to the terms and conditions therein. That appellant Royal Indemnity Company or Blodgett's Auto Service for Royal Indemnity Company received a consideration for insuring said Sam G. Richardson and like persons under said contract of insurance. [Par. XIV, Amended Complaint, R. 13.]

Said judgment nor any part thereof has not been paid and remains wholly due and owing to appellee. [Par. XV, Amended Complaint, R. 13.]

Under and by virtue of the provisions of said insurance contract, Richardson was an additional insured. That as of April 9, 1946, said contract among other things insured Sam G. Richardson and provided that said insurer would pay judgments, costs taxed against the insured in a legal proceeding, together with interest accruing on judgments resulting from litigation until the payment thereof. [Par. XVI, Amended Complaint, R. 13-14.]

That all conditions and requirements of said insurance contract have been complied with, excepting the appellant making the payments due thereunder as demanded in the complaint. [Par. XVII, Amended Complaint, R. 14.]

Hereinbefore appellee has caused to be made a demand upon said insurer for the payment of said judgment, together with interest and costs, which demand has been refused and the same is now wholly due and owing to appellee. [Par. XVIII, Amended Complaint, R. 14.]

In the second cause of action of the Amended Complaint the appellee incorporated by reference all the paragraphs contained in his first cause of action, and further alleged that:

> Prior to April 9, 1946, appellant had, for a valuable consideration, entered into a written insurance contract with Harry E. Blodgett, or Roy R. Jordan as aforesaid executor of the said estate or as testamentary trustee of said estate. That said insurance contract or contracts provided that said appellant would insure Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the estate of Harry E. Blodgett, deceased, and Roy R. Jordan as said executor or trustee, and any other person against loss by reason of liability imposed by law upon each or any of them for damages because of bodily injury or destruction of property sustained by any person or persons, caused by and arising out of the use of the automobiles as scheduled in said policy. That a Packard automobile was scheduled in said insurance contract, and on April 9, 1946, was an asset of and owned by Blodgett's Auto Service. [Par. II, second cause of action, Amended Complaint, R. 14-15.]
>
> Said contract or contracts were on April 9, 1946, in full force and effect. [Par. III, second cause of action, Amended Complaint, R. 15.]

Appellee prayed judgment in the sum of $31,014.00, together with interest thereon at the rate of 7% per annum from the 12th day of September, 1946, until paid, and for his costs incurred therein, and such other and further relief as might seem just and equitable in the premises. [R. 15-16.]

On or about the 3rd day of February, 1950, appellant Royal Indemnity Company filed its answer to the amended complaint, in which it admitted that:

Prior to April 9, 1946, Harry E. Blodgett did business in the County of Los Angeles, State of California, in the renting for hire of passenger automobiles or drive yourself passenger vehicles.

That Harry E. Blodgett died on February 15, 1946, and subsequent thereto Roy R. Jordan was appointed executor of the estate of the said Harry E. Blodgett and testamentary trustee of the deceased's last will and testament.

The said Roy R. Jordan managed, conducted and operated the aforesaid car rental business.

Roy R. Jordan conducted the said business in the City of Pasadena and rented vehicles in the said City, to be used on the public streets of the said City of Pasadena, County of Los Angeles, State of California.

Said business was operated under the terms of that certain ordinance of the City of Pasadena known as Ordinance No. 3041 as amended.

Prior to April 9, 1946, Royal Indemnity Company entered into a written insurance contract with the estate of Harry E. Blodgett and Roy R. Jordan.

A Packard automobile was scheduled in the said insurance contract. Prior to April 9, 1946, Blodgett's Auto Service rented the said Packard motor vehicle to Richardson in the City of Pasadena, for an initial term expiring 4/14/46.

Prior to the alleged date it had notice of the purported collision accident and the claims and alleged suit of plaintiff.

In its said answer apellant denied that:

Said Doe Company and Roe Company prior to April 9, 1946, had a written contract with defendant Royal Indemnity Company or Roy R. Jordan to insure against excess liabilty from or to reinsure against claims or liabilties imposed by law for personal injuries or property damage resulting from accidents occurring in the operation of the business known as Blodgett's Auto Service.

Said insurance contract provides that said Royal Indemnity Company guarantees payment to a judgment creditor for that part of said judgment which is within the amounts expressed in said policy, agrees to and would be liable for damage to property or the injury to any person, agrees with the insured to pay on behalf of the insured all sums which the insured shall become obligated to pay for damages because of bodily injury or injury to or destruction of property sustained by any person caused by accident, and would insure against liability from bodily injury or destruction of property or damage to property or for injury to any person or persons caused by and arising out of or resulting from negligence in the use, operation or ownership of the automobiles scheduled in said policy by any person operating said vehicle with permission of the owner. That said contract further provides that Blodgett's Auto Service, or Roy R. Jordan as said executor, or trustee, or any other person sustaining negligent injury, or whose property is negligently damaged becomes a judgment creditor, is protected by said contract. Further said contract provides that said Royal Indemnity Company shall defend in the name and on behalf of any suit against the insured.

Richardson on April 9, 1946, drove, operated and used said Packard automobile with the permission and

consent of Blodgett's Auto Service, or Roy R. Jordan as said executor or testamentary trustee.

Appellant at no time notified Sam G. Richardson that said contract of insurance insured him pursuant to the terms and conditions therein. That appellant Blodgett's Auto Service for Royal Indemnity Company received a consideration for insuring said Richardson and like persons under said contract of insurance.

Under and by virtue of the provisions of said insurance contract, Richardson was an additional insured. That as of Apirl 9, 1946, said contract among other things insured Richardson and provided that said insurer would pay judgments, costs taxes against the insured in a legal proceeding, together with interest accruing on judgments resulting from litigation until the payment thereof.

There is now due and owing to appellee by this appellant payment of said judgment, or any other judgment, together with interest and costs, or that there ever was or is due or owing from this apellant to appellee any sum or sums whatsoever.

In its answer appellant denied on information and belief that:

Said automobile was in the possession of Richardson on April 9, 1946.

Richardson drove the Packard automobile, or any other vehicle, into and upon appellee.

Said judgment or any part thereof has not been paid and remains wholly due and owing to appellee.

In its said answer the appellant alleged that the said Richardson did not notify appellant or the named assureds that he had ever been served with summons and

complaint in the Superior Court case number 516890; further, that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of damages and that no testimony was introduced on behalf of the said Richardson and that judgment was entered in said action against him by default.

As affirmative defenses to the amended complaint appellant alleged as follows:

> That it was provided in said insurance contract that as one of the conditions of this appellant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the appellant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits; and alleged that the said Richardson failed, neglected and refused to cooperate with this appellant in the securing of the information and attendance of witnesses, failed to render to the appellant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify appellant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to appellant or to request appellant to defend said action; that the said Richardson failed and neglected to notify this appellant of the date of trial and failed and neglected to appear at the trial of said action as a witness and appellant was not aware that said Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Richardson referred to in appellee's complaint.

That the policy of insurance referred to in appellee's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions were as set out in Appellee's Exhibit "A," and among other things, provided that the insureds should at all times render to this appellant all cooperation and assistance and to aid this appellant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in appellee's amended complaint to this appellant or to the named assureds; that the said Richardson failed, neglected and refused to notify this appellant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this appellant or the named assureds of the date of trial, and in fact, this appellant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Richardson; that the said Richardson failed, neglected and refused to cooperate with this appellant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this appellant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this appellant.

Interrogatories and Answers Thereto:

On March 10, 1950, appellee filed his Interrogatories [R. 87-96] and on March 29, 1950, appellant filed its answers thereto [R. 96-99], in which it alleged that:

> The only policy of insurance between the persons alleged in Interrogatory Number 1 and this appellant, was that policy annexed as Exhibit "A" to appellee's amended complaint. [Int. No. 1, R. 87-88; Ans. No. 1, R. 96.]
>
> Appellant was unable to answer Interrogatory No. 2 as to whether or not accident reports were on file with the police department of the City of San Gabriel, the Sheriff's Office of the County of Los Angeles, or the Pomona Division of the State Highway Patrol of California, nor did appellant have any knowledge as to the contents thereof. [Int. No. 2, R. 88; Ans. No. 2, R. 96.]
>
> It had no information or belief as to the dates that said reports were filed or whether Sam Richardson signed any original report pertaining to the alleged injury or collision. [Int. No. 3 and No. 4, R. 88-89; Ans. No. 3 and No. 4, R. 97.]
>
> Appellant did not know the exact contents of the said papers or report. [Int. No. 5, R. 89; Ans. No. 5, R. 97.]
>
> It was unable to specify in what respect or to what extent the aforesaid Packard automobile was not being driven, operated or used at the time of the collision with the permission or consent of Harry E. Blodgett or Roy R. Jordan, for it had no information or belief as to whether the said automobile was being operated or used pursuant to that certain rental

agreement referred to by appellee. [Int. No. 6, R. 89; Ans. No. 6, R. 97.]

Appellant did not have sufficient information or belief on which to answer Interrogatory No. 10 in regard to whether or not the investigation reports of the Sheriff's Office and the California Highway Patrol showed the residence of Richardson, to be 836 South San Gabriel Boulevard, San Gabriel, California. [Int. No. 10, R. 90; Ans. No. 10, R. 97.]

It did not have sufficient information or belief upon which to answer Interrogatory No. 11 in respect to whether or not Roy R. Jordan recovered the said Packard automobile from the vicinity of 836 South San Gabriel Boulevard, San Gabriel, California. Int. No. 11, R. 90; Ans. No. 11, R. 97.]

It did not have sufficient information or belief upon which to answer Interrogatory No. 12 in respect to what Jordan required Richardson to do in regard to renting said Packard. [Int. No. 12, R. 90; Ans. No. 12, R. 97.]

It did not have sufficient information or belief upon which to answer Interrogatory No. 13 in respect to the records kept by Jordan in regard to the nature and contents of any documents, certificates or licenses exhibited by the said Richardson prior to renting the Packard. [Int. No. 13, R. 90-91; Ans. No. 13, R. 97.]

Prior to April 9, 1946, Jordan did write or place insurance for appellant, and maintained an insurance office in the City of Pasadena. [Int. No. 14, R. 91; Ans. No. 14, R. 97.]

On or about June 12, 1946, Jordan forwarded to this appellant a copy of the complaint served upon

him in Superior Court case Number 515192 and the only notice or knowledge received from Jordan as to the alleged collision was contained in the said complaint. [Int. No. 15, R. 91; Ans. No. 15, R. 97.]

Appellant commenced to investigate the circumstances surrounding the aforesaid collision a few days after the receipt of the complaint forwarded to it on or about June 12, 1946, by Jordan. [Int. No. 16, R. 91; Ans. No. 16, R. 97.]

Subsequent to April 9, 1946, and prior to June 27, 1946, neither Jordan nor his representatives did communicate with or report to appellant that said pedestrian was or claimed to be seriously injured physically. [Int. No. 18, R. 92; Ans. No. 18, R. 97.]

On or about December 19, 1946, an investigator of this appellant orally requested the said Richardson to inform him as to the facts surrounding the alleged collision. [Int. No. 20 and No. 21, R. 92-93; Ans. No. 20 and No. 21, R. 97-98.]

Appellant had no information or belief as to what the said Richardson could have truthfully testified to at the time of trial; however, appellant did not believe that he would have testified to any fact tending to establish his liability to appellee. [Int. No. 22, R. 93; Ans. No. 22, R. 98.]

Neither Harry E. Blodgett or Roy R. Jordan or "Blodget's Auto Service and Tours," subsequent to April 9, 1946, notified, attended, assisted or cooperated with appellant regarding defending Superior Court suits Nos. 515192 or 516890. [Int. No. 24, R. 93; Ans. No. 24, R. 98.]

Appellant was never requested to defend Richardson in any legal action, nor was it informed that he had ever been served in any action. [Int. No. 25, R. 93-94; Ans. No. 25, R. 98.]

Subsequent to April 9, 1946, it was prejudiced in that a default judgment was taken against the said Richardson without knowledge on the part of this appellant. [Int. No. 26, R. 94; Ans. No. 26, R. 98.]

Appellant had employed about seven full time investigators, adjusters or representatives in Los Angeles County regarding court actions during the period from April 9, 1946, to September 12, 1946. [Int. No. 27, R. 94; Ans. No. 27, R. 98.]

Appellant did not have sufficient information or belief upon which to answer Interrogatory No. 28 in respect to whether or not investigation notes, memoranda or reports compiled by the police department, sheriff's office or California Highway Patrol regarding the said collision were available to it from April 9, 1946. [Int. No. 28, R. 94; Ans. No. 28, R. 98.]

Appellant did not have exclusive control of defending or the opportunity to defend Superior Court Actions 515192 and 516890, entitled "George N. Olmstead vs. Sam G. Richardson, H. E. Blodgett, Roy Jordan as Executor of the Estate of Harry E. Blodgett, Deceased, *et al.,*" from June, 1946, and thereafter. [Int. No. 29, R. 94; Ans. No. 29, R. 98.]

Appellant did not tender, make or attempt to make any defense of Richardson, at any time, in the two Superior Court suits. [Int. No. 30, R. 94-95; Ans. No. 30, R. 98.]

Appellant has paid $3,500.00 on the part of Roy Jordan, executor of the estate of Harry Blodgett. [Int. No. 31, R. 95; Ans. No. 31, R. 98.]

Appellant had no information or belief upon which to answer Interrogatory No. 32 in respect to what

conditions or requirements contained in the policy annexed as Appellee's Exhibit "A" to the amended complaint, had not, as to the appellee, been complied with or performed. [Int. No. 32, R. 95; Ans. No. 32, R. 99.]

Appellant had no information or belief prior to April 9, 1946, in regard to the area outside of the City of Pasadena in which said rented automobiles were being driven. [Int. No. 33, R. 95; Ans. No. 33, R. 99.]

Appellant at no time made an attempt to intervene, appear for or make any formal motions for or on behalf of Sam Richardson in Superior Court case number 516890. [Int. No. 34, R. 95-96; Ans. No. 34, R. 99.]

Request for Admissions and Answers Thereto.

On February 15, 1950, appellee filed his request for admissions [R. 68-73] and on April 7, 1950, appellant filed its answers thereto. [R. 99-102.]

In its answers appellant admitted that:

The said Packard was in the possession of Richardson on April 9, 1946. [Req. No. 1, R. 69; Ans. No. 1, R. 99.]

Richardson drove, operated and used the said vehicle on the alleged date. [Req. No. 2, R. 69; Ans. No. 2, R. 99.]

Said vehicle was involved in an accident with the appellee on or about the time alleged. [Req. No. 5, R. 69; Ans. No. 5, R. 100.]

The said accident and the injuries purportedly resulting therefrom were the basis of appellee's cause of action. [Req. No. 6, R. 69-70; Ans. No. 6, R. 100.]

There was a collision between appellee and Richardson at or about the time and place alleged. [Req. Nos. 7 and 8, R. 70; Ans. Nos. 7 and 8, R. 100.]

The said rental memorandum shows the residence of Richardson to be 836 South San Gabriel Boulevard, San Gabriel, California, as of April 7, 1946. [Req. No. 9, R. 70; Ans. No. 9, R. 100.]

On or about the said date it agreed in open court to a stipulated judgment against the estate of Harry E. Blodgett and thereafter paid to appellee the sum of $3,500.00 and received a full satisfaction of judgment therefor. [Req. No. 12, R. 71-72; Ans. No. 12, R. 101.]

It received full payment of the premium charged for the insurance contract attached to appellee's amended complaint as Exhibit "A." [Req. No. 13, R. 72; Ans. No. 13, R. 101.]

The said Jordan cooperated with it to the best of his ability, but in this connection appellant alleged that the first and only notice of accident received from the said Jordan consisted of a notification of the contents of the summons and complaint in the alleged action which were served upon said Jordan. [Req. No. 14, R. 72; Ans. No. 14, R. 101-102.]

The vehicle described in appellee's amended complaint was rented by the Blodgett Auto Service on

or about the date alleged, in the City of Pasadena, to Richardson for an initial term expiring April 14, 1946. [Req. No. 15, R. 72; Ans. No. 15, R. 102.]

Certain portions of the insurance contract were printed and others were typewritten. [Req. No. 16, R. 72-73; Ans. No. 16, R. 102.]

In its answers appellant denied that:

The said Richardson had the permission or consent of Jordan to drive or operate or use the said vehicle at the time and place of said accident. [Req. Nos. 3 and 4, R. 69; Ans. Nos. 3 and 4 R. 99-100.]

Richardson negligently drove the aforesaid Packard automobile into or upon plaintiff. [Req. Nos. 7 and 8, R. 70; Ans. Nos. 7 and 8, R. 100.]

Appellant ever admitted that Richardson was using the aforesaid automobile at the time and place alleged with the permission, consent or acquiescence of Harry E. Blodgett. [Req. No. 11, R. 70-71; Ans. No. 11, R. 101.]

In response to Request No. 10 appellant could not admit or deny the contents of the records of the Sheriff of Los Angeles County in regard to service of summons upon the said Richardson for the reason that it had never inspected any such records, but in this connection appellant denied that the said Sam Richardson was ever personally served with summons or complaint as alleged by plaintiff, or otherwise legally served with such summons and complaint. [Req. No. 10, R. 70; Ans. No. 10, R. 100-101.]

Motion to Strike and Motion for Summary Judgment.

On February 15, 1950, appellee filed a motion to strike portions of appellant's answer to amended complaint and for summary judgment on the pleadings. In its said motion the appellee sought to strike certain portions of appellant's answer [R. 73-77] wherein appellant alleged that:

> "Sam Richardson did not notify the defendant or the named assureds that he had ever been served with summons and complaint in said action; further that defendant is informed and believes and thereupon alleged that the said Sam Richardson did not appear in court prior to the entry of his default or at the hearing of the said action for the assessment of damages and no testimony was introduced on his behalf. Judgment was entered in the said action against him by default.
>
> It was provided that in said insurance contract that as one of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits. The said Sam G. Richardson failed, neglected and refused to cooperate with defendant in the securing of information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to defendant or to

request defendant to defend said action. Said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint.

That the policy of insurance referred to in plaintiff's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit 'A' and among other things, provides that the insureds shall at all times render to this defendant all cooperation and assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subse-

quent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this defendant." [R. 74-76.]

Appellee's motion for summary judgment was based on the contention that appellant's answer to appellee's amended complaint failed to state any sufficient defense to appellee's cause of action and that appellee was entitled to judgment as a matter of law. [R. 76-77.]

In support of the motion for summary judgment appellee filed the affidavits of J. D. Brady, George N. Olmstead and Walter N. Hatch. [R. 82-87.]

In the affidavit of J. D. Brady affiant, in substance and effect, deposed that he was a lieutenant in the sheriff's office of Los Angeles County; that the records of the said office showed that a deputy by the name of Roy Carter had served a summons and complaint in the action entitled "George N. Olmstead vs. Sam G. Richardson *et al.,* number 516890" at 804 South San Gabriel Boulevard, San Gabriel, California, at 1:00 P. M. It was further averred therein that a service ticket had a notation thereon in the handwriting of the said Roy Carter which stated:

"'Sam G. Richardson is 5 feet 7 or 8 inches, 150-160 pounds, black wavy hair, small mustache, he

asked what it was all about and I showed him complaint and he then remarked "Oh, that was something that happened three or four months ago." ' "

In the affidavit of George N. Olmstead affiant, in substance and effect, deposed that he was the plaintiff in the aforesaid suit and that he had not been paid any amount by the said Sam Richardson on account of his judgment against the said Richardson and that the whole remained due and owing to him.

In the affidavit of Walter N. Hatch, affiant, in substance and effect, deposed that he was a sergeant with the Police Department of the City of San Gabriel; that on April 9, 1946, he was on duty, engaged in patrol work; that on the said date he investigated the circumstances of an accident which occurred in or about the 1200 block of South San Gabriel Boulevard; that he ascertained that the identification documents upon the injured person were in the name of George N. Olmstead and that Sam Richardson was at the location where the affiant found the injured male identified as George N. Olmstead; that upon arrival at the said location Sam Richardson stated to affiant that he was the driver of the Packard involved in the collision with George N. Olmstead and that the said vehicle was a rented vehicle; that subsequent thereto affiant had several conversations with Richardson over the period of eight or nine weeks and Richardson again stated that he had been the driver of the vehicle involved; that the said Richardson continued to reside at 836 South San Gabriel Boulevard and operated a service station at Grand and San Gabriel Boulevard for eight or nine weeks subsequent to the said accident.

Hearing on Motions.

On April 3, 1950, the appellee's motion to strike certain portions of the appellant's answer and appellee's motion for summary judgment came on for hearing and were argued before the court.

Order of Court re Motions.

On April 27, 1950, the court filed its order granting appellee's motion to strike the said portions of appellant's answer. [R. 105-108.] On the same date the court filed its findings of fact and conclusions of law [R. 108-120] and entered its judgment granting a summary judgment in favor of appellee. [R. 120-121.]

Motion for Leave to Amend Answer.

On May 5, 1950, appellant filed a motion for leave to file an amendment to its answer [R. 102-103] and for reason therefor appellant stated that on April 10, 1950, it discovered for the first time that Richardson had never been served with summons and complaint in the case of *Olmstead v. Royal Indemnity Company, et al.,* Los Angeles Superior Court action number 516890. It was further stated that the amendment was necessary and material to the defense of the above entitled action.

The amendment to answer [R. 104-105] alleged by way of a further, separate and distinct affirmative defense to both causes of action of appellee, that the judgment sued

upon was void for the reason that the said Superior Court of the State of California in and for the County of Los Angeles had never acquired jurisdiction over the said Richardson in that the said Richardson was never properly served with a copy of the summons and complaint.

Motion for New Trial and to Set Aside Judgment.

On May 4, 1950, appellant filed a motion for a new trial and to set aside judgment [R. 122-130] on the ground that:

It was error for the court to grant appellee's motion for summary judgment in that the record and all the pleadings and papers on file showed that there were genuine issues as to several material facts and that the appellee was not entitled to judgment as a matter of law.

It was also stated in the said motion that it was error for the court to make certain findings of fact more particularly enumerated on pages 123 to 128 of the Record.

It was further contended by appellant that it was error for the court to award judgment to appellee in the sum of $20,014.00 for the reasons that:

(a) The contract of insurance limited the liability of the appellant to $15,000.00 for personal injuries.

(b) The Ordinance relied upon by appellee did not require insurance for property damage.

(c) Appellee's complaint in the Los Angeles Superior Court case, which is the basis of the above entitled action, was a complaint for damages to person and not to property.

(d) That the contract of insurance in question did not include special damages arising out of personal injuries as damages to property.

(e) Special damages arising out of personal injuries are not damages to property.

(f) There is a complete and full satisfaction on record in the Los Angeles Superior Court case number 516890, which was the basis of appellee's action against appellant.

In support of these motions appellant filed the affidavits of: Sam G. Richardson [R. 130-132]; George E. Hosey [R. 132-133]; Elizabeth E. Richardson [R. 133-134]; Robert E. Dunne [R. 134-135]; Hulen C. Callaway [R. 135-139] and R. W. Clayton [R. 140-142].

In the affidavit of Sam G. Richardson [R. 130-132] affiant deposed and said: That on or about the 21st or 22nd day of July, 1946, he had departed from the State of California and went to Fort Worth, Texas, where he remained for four or five weeks; that at no time during August of 1946 was he in the State of California and that at no time was affiant served with a summons and complaint or any papers in an action instituted by George N. Olmstead; that during the last ten or fifteen years he had never grown or worn a mustache; that in 1946 he was 5′ 9″ in height, weighed 175 pounds and had straight hair, the color of which was light brown sprinkled with grey, with grey hair at the temples.

In the affidavit of George E. Hosey [R. 132-133] affiant deposed and said that he was personally acquainted with Sam G. Richardson and his mother, Mrs. Elizabeth

E. Richardson of Ft. Worth, Texas; that he saw the said Sam G. Richardson daily from the latter part of July, 1946, to the latter part of August, 1946; that he knew of his own knowledge that Sam G. Richardson was in Ft. Worth, Texas, on August 3, 1946.

In the affidavit of Hulen C. Callaway [R. 135-149] affiant deposed and said that he was and had been one of the attorneys of record in the above case since it was filed and actively in charge of the defense of said case; said affidavit went on to state in detail all of the various efforts that he had made and which he caused to be made to garner the facts preparatory to filing the necessary pleadings in the defense of the above entitled case.

Affiant further stated that the fact that no legal service had been made on Richardson had not been discovered until April 10, 1950, which was subsequent to the hearing on appellee's motion for summary judgment on April 3, 1950.

In the affidavit of Robert E. Dunne [R. 134-135] affiant deposed and said that he was an attorney at law licensed to practice in the State of California; that he was one of the attorneys for appellant in the above-entitled case; that on the 10th day of April, 1950, he interviewed Richardson at Folsom Prison; that the said Richardson had been incarcerated in the said prison since January, 1948, and he had light brown hair streaked with gray and is gray at the temples.

In the affidavit of R. W. Clayton [R. 140-142] affiant deposed and stated in detail all of the steps and efforts taken by him to investigate the facts and circumstances concerning the whereabouts of Richardson.

Attached to the appellant's motion for new trial as Exhibit "X" was a copy of the complaint in the case of

George N. Olmstead v. Sam Richardson, et al., numbered 516890 entitled "complaint for damages to person." [R. 142-148.]

Statement in Opposition to Motion.

On May 10, 1950, appellee filed his statement of reasons in opposition to motion and in support thereof filed a counter-affidavit of C. Paul DuBois [R. 149-156]; a copy of summons [R. 157-159]; and an affidavit of R. W. Carter, deputy sheriff. In the latter affidavit affiant deposed and said that he had served a person whom someone had pointed out to him as Sam Richardson and that the said Sam Richardson was 5 feet, 7 or 8 inches in height, 150-160 pounds, had black wavy hair with a small mustache; and a copy of an order of suspension of the driver's license of Sam Richardson signed by Edgar E. Lampton.

Order of Court re Motion to Amend Answer and Motion to Set Aside Judgment.

On May 22, 1950, the court filed its memorandum decision and its minute order. In its said order it denied the motion for new trial and appellant's motion to file an amendment to answer, and granted the motion to set aside the judgment and ordered a new judgment in the sum of $16,500.00 plus $14.00 costs. [R. 166-171.]

On June 26, 1950, the court filed its modified findings of fact and conclusions of law. [R. 173-176.]

Judgment of the Trial Court.

On June 26, 1950, the court entered a new judgment in the sum of $16,514.00 with interest thereon from September 12, 1946, in favor of George N. Olmstead. The total amount of said judgment, including interest, was $20,879.45. [R. 177-178.]

SPECIFICATION OF ERRORS.

IT WAS ERROR FOR THE TRIAL COURT TO STRIKE A PORTION OF APPELLANT'S ANSWER.

IT WAS ERROR FOR THE TRIAL COURT TO GRANT A JUDGMENT BASED ON AN INVALID JUDGMENT OBTAINED IN THE STATE COURT.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION TO AMEND ANSWER.

IT WAS ERROR FOR THE TRIAL COURT TO GRANT A SUMMARY JUDGMENT IN FAVOR OF APPELLEE FOR THE FOLLOWING REASONS:

1. *The record and all the pleadings and papers on file herein show that there are genuine issues as to several material facts.*

2. *The following findings of fact made by the trial court were erroneous:*

(a) "That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation or use thereof by any person responsible for such operation." [Finding No. IV, R. 110.]

(b) "That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena." [Finding VII, R. 111.]

(c) "That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard." [Finding XIII, R. 113.]

(d) "That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage." [Finding XVI, R. 133.]

(e) "That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California in and for the County of Los Angeles, wherein plaintiff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of $25,000.00 and on account of property damage in the sum of $6,000.00 on the 12th day of September, 1946." [Finding XVII, R. 113-114.]

(f) "That it is true that defendant, Royal Indemnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and circumstances thereto, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Richardson and the named insureds as the result of

(g) "That it is true that plaintiff's judgment and all thereof against Sam Richardson, also known as Sam G. Richardson, was and is unpaid, and that interest at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff's allowed costs of suit in said Superior Court action in the sum of $14.00." [Finding XX, R. 114-115.]

(h) "That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant's additional insured, Sam G. Richardson." [Finding XXIV, R. 116.]

(i) "That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff's claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits." [Finding XXV, R. 116.]

(j) "That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff's Superior Court action for civil damages, in a verified answer for said named insured of June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiescence of the named insured." [Finding XXVIII, R. 117.]

(k) "That it is true that plaintiff's judgment against Sam G. Richardson in the prior civil action for damages in the Superior Court has not been satisfied in whole or in part." [Finding XXIX, R. 117.]

(1) "That it is common knowledge that automobiles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena." [Finding XXXII, R. 118.]

(To avoid unnecessary repetition the detailed particulars showing wherein the above findings are error are set forth in *Argument* hereinbelow, rather than at this point.)

3. *Appellee was not entitled to summary judgment as a matter of law for the following reasons:*

a) The policy was a voluntary policy and appellant was entitled to assert its defenses thereunder against appellee.

b) The State Court judgment upon which appellee's action was based had already been satisfied.

4. *No judgment against appellant could have legally exceeded $15,000.00.*

a) The contract of insurance limits the liability of appellant to $15,000.00 for personal injuries.

b) Appellee's complaint in Los Angeles Superior Court action 516890, which is the basis of the above entitled action, is "a complaint for damages to person" and makes no allegations or prayer concerning damages to property.

c) Coverage B on page 2 of Exhibit "A" attached to plaintiff's complaint [R. 21] shows that property damage as used by the parties referred to "damages because of injury to or destruction of property. . . ."

d) Special damages arising out of personal injuries are not damages to property.

e) The ordinance relied upon by plaintiff does not require insurance for property damage.

SUMMARY OF ARGUMENT.

The contract of insurance herein specifically set forth the terms and provisions which governed the parties. By striking the above outlined portions of the appellant's answer the court negatived certain of these terms and thereby deprived the appellant of valuable rights under the said contract. In making its decision the court reasoned that the said policy of insurance was compulsory. However, the accident occurred outside of the city limits of the City of Pasadena and therefore beyond the governmental jurisdiction of that municipality. The policy was, therefore, a voluntary policy as to this particular accident. Furthermore, reference to the ordinance involved herein reveals that there is no provision whatsoever in respect to damages to property; hence, it could not be said that the policy was compulsory as to such coverage.

The State court action which is the basis of appellee's suit herein was void in that the said State court never acquired jurisdiction over Mr. Richardson since he was not served with summons or complaint. In any event, an inspection of the record herein reveals that even if the said State court judgment was valid it had already been satisfied and the appellee had therefore received full satisfaction for any damage which he might have suffered. The said State court judgment was satisfied by the payment of $3,500.00 by appellant for and on behalf of Roy Jordan, executor of the estate of Harry E. Blodgett.

The trial court made thirty-three findings of fact. Not all of these findings were based upon admissions. Many of them were in dispute. Since, therefore, there were many material triable issues of fact presented the trial court should not have granted a summary judgment.

ARGUMENT.

It Was Error for the Court to Strike a Portion of Appellant's Answer.

As already indicated above, in the statement of the case, the court ordered those portions of the appellant's answer which set up the defenses of lack of cooperation, notice, etc., of the additional assured Sam Richardson, stricken. By so doing the court deprived the appellant of virtually the only protection which it had under the policy and literally made the appellant subject to liability in complete disregard of the law as well as the terms of the contract of insurance.

It is clearly well settled law in California and in most other states of this country that there are two types of insurance contracts—voluntary and compulsory. When an insured and an insurance company enter into a policy voluntarily they are of course governed by the terms of their contract and if the said policy provides that the assured is to give notice of any accident, forward suit papers and cooperate with the company, it is imperative that he so do before the insurance company becomes liable under the said contract.

Hynding v. Home Accident Insurance Co., 214 Cal. 743, 7 P. 2d 1013;

Phillips v. Stone, 297 Mass. 341, 8 N. E. 2d 890;

Sheldon v. Bennett, 282 Mass. 240, 184 N. E. 722.

It is also true that in such cases where the policy of insurance is voluntary the injured person has no greater rights against the insurance company than the assured as far as imposing liability on the insurance company for

injuries. If the insured is in violation of the terms of the contract and cannot hold the company to its contract, the injured person is in the same position in that his rights rise no higher than those of the insured and he cannot hold the insurance company liable under the terms of the contract of insurance.

If the insurance policy is compulsory, that is, if the policy is required by a statute to cover vehicles while they are being used in a certain place and in a certain manner, the injured person has rights which are greater than the rights of the assured in the event there is a violation of the policy terms by the assured.

Hynding v. Home Accident Insurance Co., supra;
Phillips v. Stone, supra;
Sheldon v. Bennett, supra.

Briefly, the insurance company is prevented from taking advantage of the terms of the compulsory insurance policy even though the assured has violated same.

In the instant case Ordinance No. 3041 of the City of Pasadena [R. p. 327] provides that:

> "Any person, firm, association or corporation may apply to the City of Pasadena for a permit to rent, lease or to allow or permit the operation or use of any drive-yourself vehicle *upon the streets of the City of Pasadena,* by filing with the City Manager of the City of Pasadena, upon forms to be supplied by said City without charge to the applicant, an application which shall state: . . . (Section 4(c).) (Italics added.)

"That the owner has secured and paid in advance the annual premium upon an insurance policy whereby the insurer agrees to be liable for the death of or injury to any person resulting from negligence in the operation of any such drive-yourself vehicle by any person using and operating the same with the permission, express or implied, of such owner." (Section 4(c)(5).)

The minimum liability upon each for-hire automobile being not less than $15,000.00 for *personal injuries* to one person and $30,000.00 for personal injuries resulting to two or more persons in any one accident. (Section 4(c)(5).)

A drive-yourself vehicle is defined in the said Ordinance as:

"A motor propelled passenger vehicle or truck . . . *which is operated or used in the City of Pasadena,* and which the owner for consideration rents or leases to or allows or permits the operation or use by, a person, firm, corporation, or association who or which directs and controls the operation or use of and furnishes the driver for said vehicle or truck, or who or which pays a separate consideration for the services of said driver." [R. p. 326.] (Section 1(h).) (Italics added.)

From the provisions of this Ordinance above referred to it can be perceived that the City of Pasadena sought to require insurance policies for certain drive-yourself vehicles *to be used on its city streets.* Therefore it would seem that as to the said vehicles being driven on the City streets the policy would be compulsory. Since the Ordinance does not purport to require insurance for vehicles driven outside the City of Pasadena, it must like-

wise be said that as to the vehicles so driven beyond the limits of Pasadena, the insurance is not required or compulsory. The accident which purportedly forms the basis of appellee's suit occurred beyond the City limits of Pasadena, to-wit: at or about the 1200 block of South San Gabriel Boulevard, County of Los Angeles. [See affidavit of Walter N. Hatch in support of plaintiff's motion for summary judgment, R. 84-87.] Therefore, any insurance on the vehicle in question was not compulsory when it was not being driven on the City streets of Pasadena.

This contention is fully supported by the decisions in those states which require compulsory insurance to be issued on all vehicles driven on the highways or streets of the state. For example: The State of Massachusetts has long had a compulsory insurance statute in force and the decisions of that state hold that when an accident involving a Massachusetts car covered by compulsory insurance occurs outside the State of Massachusetts, or upon private property, the insurance is voluntary and the injured person stands in no better position than the assured and therefore the insurer has available as against the injured person all defenses which he has as against the assured. The following decisions are representative of the many cases which hold this principle:

In *Phillips v. Stone,* 297 Mass. 341, 8 N. E. 2d 890, the court briefly summarized the facts in its holding as follows:

> "On September 4, 1931, the plaintiff was hurt by an automobile operated by the son of the defendant Stone. The accident occurred in a driveway on pri-

vate land, and not on 'the ways of the commonwealth.' Any resulting liability was not within the compulsory motor vehicle liability insurance act (G. L. (Ter. Ed.), c. 175, §113A *et seq.*), but if covered by liability insurance was subject to the principle that the injured person acquired no right against the insurer superior to that of the insured owner. If by violation of the terms of the policy the latter has lost his right to indemnity, there is nothing for the injured person to reach. (Cases cited.)

"After obtaining judgment by default against the defendant Stone, the plaintiff brought this bill in equity under G. L. (Ter. Ed.), c. 175, §§112, 113, and chapter 214, §3(10), to reach and apply to the satisfaction of the judgment the obligation of the defendant insurance company upon its policy of liability insurance. The judge found that the failure of the defendant Stone to give the defendant insurance company written notice of the accident until twenty days after the accident and eighteen days after he knew of it, was a breach of the condition of the policy that he give such notice 'as soon as practical after hearing' of an accident. This finding was warranted if not required. (Cases cited.)"

And in the case of *Sheldon v. Bennett,* 282 Mass. 240, 184 N. E. 722, the court was confronted with a similar situation, except that the accident occurred in the State of New Hampshire. In rendering its decision the court said:

"The plaintiffs contend that the company should be held to have intended to give the assured the same coverage in New Hampshire which he had in Massachusetts; that if the accident had happened in Massachusetts the company was obliged to pay any person

> when injured up to the limits of the policy, regardless of any default on the part of the assured . . . the fact that the policy which Samuel T. Bennett had was compulsory in Massachusetts did not by the extra-territorial indorsement continue the policy as a required or compulsory policy in the State of New Hampshire."

See also:

Masterson v. Am. Employers Ins. Co., 288 Mass. 518, 193 N. E. 59;

Sleeper v. Mass. Bonding & Ins. Co., 283 Mass. 511, 186 N. E. 778.

It is interesting to note that the Massachusetts courts are uniform in their support of the principle enunciated above by the cited cases even though the following unequivocal provision is found in the compulsory insurance statutes of that state:

> "That no violation of the terms of the policy and no act or default of the insured, either prior or subsequent to the issue of the policy, shall operate to defeat or avoid the policy so as to bar recovery within the limit provided in the policy by a judgment creditor proceeding under the provisions of said section one hundred and thirteen and clause (10) of section three of chapter two hundred and fourteen."

Annotated Laws of Massachusetts, Chapter 175, Sec. 113A, subsec. (5).

It is clear from the reading of the above authorities that the same policy can be both compulsory and voluntary at one and the same time. In other words, the policy is compulsory when the vehicle is being driven within that area intended to be covered by the statute or ordinance

and the same policy is voluntary when the said vehicle is beyond the said area.

In the case at bar the Appellee contends that the policy was a required policy and that therefore the insurance company was not entitled to assert against him any of the defenses which it so properly had against the assured. Presuming, without admitting, that the said policy was required, appellee fails to consider that since the accident in question occurred beyond the territorial jurisdiction of the City of Pasadena the said policy would not be compulsory as to coverage at that time and place.

By granting appellee's motion to strike the aforesaid portions of appellant's answer the court concurred in the erroneous contention of the appellee and thereby subjected the appellant to risks and hazards not anticipated at the time it entered into its contract.

It Was Error for the Court to Grant a Summary Judgment in Favor of Appellee for the Following Reasons:

1. The Record and All the Papers and Pleadings on File Herein Show That There Are Genuine Issues as to Several Material Facts.

The court made 33 findings of fact [R. 108-118], and surely it must be admitted that the court would not have made findings as to such purported facts unless it thought that they were genuine or material. And it cannot be said that all of the findings are based on admissions of the appellant for the reason, as will be shown hereinbelow, that many of the admissions requested by appellee were specifically and unequivocally denied. Furthermore, as can be shown, many of the findings of fact are without basis in

that there is absolutely no evidence whatsoever to support said findings.

In order to render its judgment the court had to determine that the prior judgment entered in the State court action No. 516890 was a valid and subsisting judgment. However, before it could make such a decision the court had to determine that Sam G. Richardson was served in the said action. Whether there was service upon the said Richardson was, therefore, a material question of fact and it was error for the court to decide the said question on a motion for a summary judgment. It is, of course, fundamental that the question presented by a motion for summary judgment is whether or not there is a genuine issue of fact and not how that issue should be determined.

Rule 56(c), Fed. Rules of Civ. Proc.;

Ramsouer v. Midland Valley R. Co., 135 F. 2d 101, 103;

Merchants Ind. v. Peterson, 113 F. 2d 4.

2. The Following Findings of Fact Made by the Court Were Erroneous.

(a) "That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation or use thereof by any person responsible for such operation." [Finding No. IV, R. 110.]

This finding was error for the reason that the ordinance speaks for itself and it makes no reference to irresponsible drivers and furthermore there was no evidence whatsoever that the City of Pasadena enacted this ordinance for this reason, or for any reason other than that specified in the ordinance to wit: To regulate the operation of drive-yourself vehicles *upon the public streets of Pasadena.*

(b) "That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena." [Finding VII, R. 111.]

This finding was error for the reason that there was no evidence introduced to show that the City of Pasadena intended to extend the effect of its ordinance beyond its city limits, or that it intended to protect citizens of other communities or that it had the right to project the effect of its ordinance beyond its limits into the jurisdiction of another governmental unit. Furthermore there was no evidence as to whether or not the contracting parties intended that this particular policy be compulsory or whether or not there had been other or previous policies issued to comply with the aforesaid Ordinance. Since there was no evidence offered either way, it could well be that some other policy issued by some other company was procured by Blodgett's Auto Service in satisfaction of the said Ordinance and that the policy in question was, or could have been, an additional policy.

As already indicated above, the title of the Ordinance shows that it is "An Ordinance of the City of Pasadena regulating the operation of certain motor propelled vehicles, drive-yourself vehicles, vehicles transporting passengers

for compensation or for sight-seeing purposes *upon the public streets.*" (Italics ours.) And the Ordinance defines a drive-yourself vehicle as one "which is operated or used in the City of Pasadena." See also, Section 4(c) of the said Ordinance which provides:

> "Any person, firm, association or corporation may apply to the City of Pasadena for a permit to rent, lease or to allow or permit the operation or use of any drive-yourself vehicle *upon the streets of the City of Pasadena.*" (Italics ours.)

In the face of these clear and positive provisions in the Ordinance showing that the City of Pasadena intended to regulate traffic upon its own streets, it cannot be determined how the court could have found that the aforesaid policy could have been compulsory beyond the City limits of Pasadena.

It is strange indeed that the court granted a summary judgment on the basis that the question as to whether or not the policy was compulsory or voluntary was a question of law and yet it made the above finding of fact that the said policy was compulsory.

> (c) "That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard." [Finding XIII, R. 113.]

This finding was error for the reason that there was no evidence of permission and/or consent given by the named insureds to the said Richardson to drive or use the vehicle as it was being used on the evening in question. In fact,

the answer and all other papers on file in this action show that appellant specifically denied that there was permission and/or consent.

The ordinance specifically provides that the rented vehicle must be used with the permission of the rentor. Here the appellee alleges such permission and the appellant positively denies permission or consent. Clearly, this issue is a disputed issue of fact. Merely because the vehicle was rented to Richardson does not mean that it was being operated with the permission or consent of the rentor at the time of the accident.

This principle is well expressed by the case of *Employers Casualty Company v. Williamson,* 179 F. 2d 11 at p. 13:

> "We, accordingly, conclude that the court's finding and conclusion that Yarsant obtained the possession of the truck with the consent of the partnership is supported by the record. But this does not dispose of the case. *The precise question is was Yarsant at the time of the accident using the truck for the purpose for which permission was granted."* (Italics ours.)

> (d) "That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage." [Finding XVI, R. 133.]

This finding was error for the reason that there was no evidence showing property damage and in fact the complaintiff filed by appellee in the Los Angeles Superior Court case number 516890, which is the basis of the above-entitled action, was for damages to person and was so captioned.

(e) "That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California in and for the County of Los Angeles, wherein plaintiff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of $25,000.00 and on account of property damage in the sum of $6,000.00 on the 12th day of September, 1946." [Finding XVII, R. 113-114.]

This finding was error for the reason already shown above, that there was absolutely no evidence introduced to show that appellee was awarded any amount for damages to property and in fact, he had never alleged nor prayed for damages to property in his action in the State Court.

(f) "That it is true that defendant, Royal Indemnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and circumstances thereof, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Richardson and the named insureds as the result of negligence on the part of Sam Richardson in his operation of said Packard vehicle during the rental period for which the named insureds had consented to his use and given possession of said Packard vehicle." [Finding XVIII, R. 114.]

This finding was error for the reason that there was no evidence introduced showing, or tending to show, that

this defendant had any notice other than that received from Roy Jordan which was based on the complaint served on him in the Los Angeles Superior Court case number 516890, attached hereto as Exhibit "X." Reference to Request No. 14 of the Request for Admissions [R. 72] and the Answers thereto [R. 101-102] show that the first and only notice of accident which appellant received was that notification found in the summons and complaint which was forwarded to appellant by the said Roy Jordan. It cannot be said that the allegations of the said complaint constituted notice as to actual facts of either the accident or circumstances surrounding same, for the reason that said complaint merely contained the allegations of appellee as to his interpretation of the said circumstances and did not in any way specifically outline any probative or evidentiary facts necessary to aid or assist the appellant in investigating the said accident or in enabling it to martial evidence or find witnesses to the said accident. Again it must be asserted that the complaint filed by the appellee in the State Court was a complaint for personal injuries and was not a complaint for property damage.

> (g) "That it is true that plaintiff's judgment and all thereof against Sam Richardson, also known as Sam G. Richardson, was and is unpaid, and that interest at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff's allowed costs of suit in said Superior Court action in the sum of $14.00." [Finding XX, R. 114, 115.]
>
> "That it is true that plaintiff's judgment against Sam G. Richardson in the prior civil action for damages in the Superior Court has not been satisfied in whole or in part." [Finding XXIX, R. 117.]

These findings were error for the reason that appellant proved that appellee was paid $3,500.00 in complete satis-

faction of record in the aforesaid State Court action No. 516890 (See Request No. 12 of Appellee's Request for Admissions and Answer No. 12 of Appellant's Answers to Request for Admissions).

> (h) "That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant's additional insured, Sam G. Richardson." [Finding XXIV, R. 116.]

This finding was error for the reason that there was no evidence introduced to show that appellee was awarded any amount for damages to property.

> (i) "That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff's claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits." [Finding XXV, R. 116.]

This finding was error for the reason that there was no evidence introduced to this effect and the argument made by appellee is not evidence. Furthermore, it would have been contrary to all legal and ethical practices for this appellant, by and through its attorneys, to enter a general appearance for Richardson who had not requested defense or representation, since it would have exposed him to liability without his consent. In fact, as shown by the affidavit of Sam Richardson [R. pp. 130-132] he had never

been served with the summons and complaint in the said action and it would have been highly irregular for the appellant to cause an appearance to be made for the said Richardson when the court never had jurisdiction over him.

(j) "That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff's Superior Court action for civil damages, in a verified answer for said named insured of June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiescence of the named insured." [Finding XXVIII, R. 117.]

This finding was error for the reason that there was no evidence introduced to this effect and this appellant has positively and unqualifiedly denied that there was such permission and/or consent. [Answer to Request for Admissions No. 11, R. 101.]

(k) "That it is common knowledge that automobiles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena." [Finding XXXII, R. 118.]

This finding was error for the reason that there was no evidence introduced to this effect and this observation was not within the issues since the question was: Did the parties to the insurance contract intend that the coverage beyond the jurisdiction of the City of Pasadena and its ordinance be compulsory or voluntary? Reference is

hereby made to the portions of the Ordinance hereinabove quoted which show that the purpose of the City of Pasadena enacting the Ordinance was *to regulate traffic on its own City streets* and whether or not vehicles do or do not leave the City limits of Pasadena has no relevance or importance in this case.

3. Appellee Was Not Entitled to Summary Judgment as a Matter of Law for the Following Reasons:

(a) The policy is a voluntary policy and appellant was entitled to assert its defenses thereunder against appellee. (For the argument in support of this contention see the matter contained under the heading: "It Was Error for the Court to Strike a Portion of Appellant's Answer"; at page 35 of this Brief.)

(b) The State Court judgment upon which appellee's action was based had already been satisfied.

Appellee contends that a judgment was rendered against Richardson and that the same remains unsatisfied. Appellant on the other hand maintains that there had been a satisfaction of judgment for the following reasons:

(a) The judgment entered in favor of appellee in that certain action was a default judgment against the said Richardson. [R. p. 64.]

(b) The said judgment was entered in the same case in which Roy Jordan, Executor of the Estate of Harry E. Blodgett, deceased, was sued and the said default judgment was entered before a judgment was rendered in favor of appellee and against the said Roy Jordan, in the sum of $3,500.00.

(c) A satisfaction of judgment against the said Roy Jordan was entered as "full satisfaction of record in said action."

These three factors are significant for the following reasons: Where two defendants having a joint liability are sued and a default judgment is rendered against one of these persons, the court may go on to judgment as against the other defendant, however a satisfaction of the judgment against either of these defendants bars the plaintiff from receiving further satisfaction from the other defendant for the reason that the plaintiff can have but one satisfaction for the injury that he has received.

Tompkins v. Clay Street R.R. Co., 66 Cal. 163, 4 Pac. 1147;

Dawson v. Schloss, 93 Cal. 194, 29 P. 31;

Grundel v. Union Iron Works, 173 Cal. 438, 441, 160 P. 565.

In *Tompkins v. Clay Street R.R. Co., supra,* a car of the Clay Street Hill Company collided with a car of the Sutter Street Railroad Company. Plaintiff, a passenger in the car of the latter company, was thrown from her seat and injured. Plaintiff recovered damages from the Clay Street R.R. Company and the appeal was by that company.

The court was confronted with the question concerning the right of plaintiff to recover against one of two tort-feasors when the other had already made payment to plaintiff. In its decision the court said:

> "Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her but a single

> cause of action. If she had brought a separate action against the Sutter Street Company, *and recovered a judgment therein, and such judgment had been satisfied,* she could not subsequently have maintained another action for the same injuries against the Clay Street Company, inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained." (Italics added.) (P. 166.)

Furthermore, it is clearly well settled law in this State that when one of the joint defendants defaults and the action continues to judgment as against the remaining defendant, the amount which the plaintiff finally obtains in the action (wherein there was no default) is the only amount to which the plaintiff is entitled.

> *Cole v. Roebling Const. Co.,* 156 Cal. 443, 105 P. 255.

In that case the action was one for the recovery of $6,618.00 for personal injuries alleged to have been suffered by reason of the negligence of the defendants. Summons was duly served on both defendants and one of the defendants, Wilson, failed to appear within the time allowed by law and his default was entered on March 1, 1907. On March 29, 1907, the court proceeded to the hearing of the cause as to Wilson and found the damage was $6,318.00 and ordered a judgment against Wilson accordingly. The findings and decision were filed on March 29, 1907, and the judgment was entered on March 30, 1907.

The said defendant Wilson appealed and contended in part that the trial court had no right to award separate

judgment against him, and secondly, he contended that when the action went to trial as against the one defendant the judgment therein might be for an amount smaller than the judgment entered against him.

The court summarily dismissed the first contention by stating that the injured party could have brought separate actions against Wilson and the other defendant, and although containing the precise allegations to each party would have stated a complete and separate individual liability against the party sued. The court further stated that the awarding of a judgment in one of the causes of action did not preclude the plaintiff from proceeding to judgment against the other, *but that the plaintiff would be barred from recovering on one judgment if he had satisfaction for the other judgment.*

In respect to defendant Wilson's contention that the action against his co-defendant might well proceed to judgment in an amount lower than that against him, the court said:

> "There will be no severance of damages even if plaintiff is allowed to proceed and obtain judgment against the remaining defendant for a different amount. *The amount for which he finally obtains judgment* against the other defendant would be the total amount of damage that in the opinion of the trial court or jury the plaintiff had suffered from the wrongful act of both defendants." (Italics ours.) (P. 450.)

In the case at hand the appellee caused a default judgment to be entered as against Sam G. Richardson on September 13, 1946, and on April 22, 1947, appellee received

a judgment as against Roy Jordan in the amount of $3500.00, which judgment was satisfied on April 23, 1947; the appellee has, therefore, received full and due compensation from one of the joint defendants sued in the case of Olmstead v. Sam G. Richardson, Los Angeles Superior Court No. 516890, referred to in appellee's pleadings and supporting papers, and is not entitled to further compensation.

See also:

Butler v. Ashworth, 110 Cal. 614, 43 P. 386.

4. No Judgment Against Appellant Could Have Legally Exceeded $15,000.00 for Personal Injuries, in That:

(a) The contract of insurance limits the liability of appellant to $15,000.00 for personal injuries.

(b) Appellee's complaint in Los Angeles Superior Court action No. 516890, which is the basis of the above entitled action, is a complaint for damages to person and makes no allegations or prayer concerning damages to property.

By virtue of Coverage A of the policy [R. 20] the appellant agreed to pay on behalf of the insured all sums which the insured would become obligated to pay by reason of the liability imposed upon him by law for damages, *including damages for care and loss of services* because of bodily injury, sickness, or disease sustained by any person caused by accident. The limits of liability as to Coverage A was $15,000.00 for each person so injured. [R. 19.]

Since appellee did not sue for damages to property in his action in the State Court he clearly was not entitled to demand payment from the appellant for any damage to property in the action herein.

(c) Coverage B on page 2 of Exhibit "A" attached to plaintiff's complaint [R. 21] shows that property damage as used by the parties, referred to "damage because of injury to or destruction of property . . ."

(d) Special damages arising out of personal injuries are not damages to property.

(e) The ordinance relied upon by plaintiff does not require insurance for property damage.

At the very outset it must be noted that the term "property" can be shown to have almost any desired meaning when considered abstractly. This is true for the very reason that everything in this world, apart from human beings, is property and in some parts of the world even human beings are property. In short, everything in this world can be owned by someone. For example:

As early as 1858 the Supreme Court of the State of California defined property as follows:

> "Property is the exclusive right of possessing, enjoying, and disposing of a thing; it is 'the right and interest which a man has in lands and chattels, to the exclusion of others'; and the term is sufficiently comprehensive to include every species of estate, real or personal. (McKeon v. Bisbee, 9 Cal. 137, 142, 70 Am. Dec. 642.)"

Since that time the courts of this state, and other states, have run the gamut and now we find that "Even a free game which a person might win on a pin ball machine has been judicially invested with the dignity of 'property.'" (*Downing v. Municipal Court,* 88 Cal. App. 2d 345 at 350, 198 P. 2d 923.) And a product of the mind is property. (*Johnston v. 20th Century-Fox Film Corp.,* 82 Cal. App. 2d 796 at 808, 187 P. 2d 474.)

Briefly, everything in which a person may have rights to the exclusion of any other person is property. (Civ. Code, Sec. 654.) However, the term property is very rarely used in this broad sense for the reason that the ordinary affairs of the every day world demand that the term be confined to that type or class of property which may be contemplated at the given time. The court in the case of *Bogan v. Wiley,* 90 Cal. App. 2d 288 at 293, 202 P. 2d 824, expressed this thought as follows:

> "The word 'property' in its most general sense is broad enough to cover everything, tangible and intangible, which may be the subject of ownership (authority cited) but 'The meaning of the term may be restricted by the context of a particular statute or writing in which it is used' (authority cited) . . .
>
> "*But the meaning to be given to the word depends upon the sense in which it is used, as gathered from the context and the nature of the things which it was intended to refer to and include.*" (Italics ours.)

To the same effect is *Los Angeles Pacific Co. v. Hubbard,* 17 Cal. App. 646 at 649, 121 P. 306.

For example: If A sells B his piece of property in Los Angeles he is clearly referring to a piece of real estate

and B knows this. If a restaurant posts a sign to the effect that it will not be responsible for "property left, lost or stolen on its premises" everyone reading this sign will understand what is intended by the restaurant. If A says to B: I have some property in a certain race horse, B understands that A means that he has an interest in the horse or is part owner of the horse.

In each of the examples immediately set forth above, the term "property" is used, yet in each instance the persons involved did not use property in its broad sense nor did they use qualifying adjectives to limit the meaning of the word property as used. Rather, each transaction spoke for itself, that is to say, the context of the exchanged language together with the surrounding circumstances indicated the exact meaning of the term in each instance.

In view of the foregoing therefore, it follows that in order to ascertain the meaning of the word "property" as used in the insuring agreement by the parties hereto, it is necessary to examine the transaction between the parties and the context of the instrument entered into by them at the conclusion of this transaction.

Referring to the context of the policy we find that Coverage B of the said policy [R. 21] is as follows:

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile."

An analysis of the various uses of the term "property" in the policy, whether taken singularly or together, indicate that it was not intended by either of the parties to be used in its broad sense. On the contrary, it can be shown that the parties intended the term "property" to include only tangible or corporeal property. For example, appellee contends that he has suffered property damage in that he has had to pay medical expenses and has suffered loss of earnings because of his injury. That is to say, that he has suffered the loss of his own services. However, such damages are included in Coverage A, which refers to the liability of appellant for bodily injury. Reference to Coverage A [R. 20-21] shows that the coverage under this clause includes "*damages for care and loss of services, because of bodily injury,* . . . sustained by any person or persons and caused by accident." (Italics ours.)

If the parties to the said insurance contract had intended that medical expenses and damages for loss of services be considered to be property, it would not have been necessary to include the above italicized clause in Coverage A. Rather such coverage would be automatically included in Coverage B.

That reference to the context of the insurance policy and the circumstances of the transaction between the parties is the proper method to arrive at a correct construction of the terms used in the policy is further supported by the following sections of the Civil Code of California, relating to the interpretation of contracts:

> "*Sec. 1641.* The whole of a contract is to be taken together, so as to give effect to every part, if rea-

sonably practicable, each clause helping to interpret the other."

"*Sec. 1643.* A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

"*Sec. 1644.* The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meanings; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

"*Sec. 1645.* Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

"*Sec. 1648.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

A detailed study of each of the above sections, together with an application thereof to the policy at hand, indicates rather sharply that the parties did not use the term property in its so-called "broad sense."

Furthermore, an examination of the Ordinance in question reveals that it was intended to require insurance for personal injuries only and not for damage to property. Therefore, all of the insuring clauses in the aforesaid policy referring to property damage must be deemed to be voluntary insurance and not compulsory for there is nothing in the Ordinance to make them so.

In view of this it must be said that in any event the defenses available to the insurance company under the terms of its policy may be asserted against appellee at least as to any claims made for property damage.

It Was Error for the Court to Deny Appellant's Motion to Amend Answer.

As already indicated above in the Statement of the Case, appellant discovered very important evidence after the hearing on appellee's motion for summary judgment. This evidence was to the effect that Sam G. Richardson had never been served in Superior Court action No. 516890, which has already been shown as the basis of appellant's law suit. Upon discovery of this evidence the appellant, through its attorneys, made a motion to amend its answer for the purpose of alleging this most important defense in its pleadings. [R. p. 104.] It is the belief of appellant that since this evidence was not discovered until after the hearing it was entitled to amend its pleadings for the protection of its interests.

Rule 15 of the Federal Rules of Civil Procedure clearly provides that a party may amend his pleadings even after judgment.

In the case of *Downey v. Palmer,* 27 Fed. Supp. 993, a motion made by the defendant to dismiss the complaint was granted in the alternative and the plaintiff served a reply pursuant thereto. The defendant then sought to amend her answer by setting up a defense of statute of limitations. The plaintiff had objected to such amendment on the ground that it did not go to the merits and that

it had been waived. The court granted the motion and stated:

> "Under our new Rules amendment of pleadings is to be freely allowed when justice so requires."

Surely, it cannot be denied that the above mentioned evidence showing that there had never been any service upon Richardson was improper for the reason that such a judgment entered in a case where there had never been service of process upon a defendant cannot be deemed to be a valid or subsisting judgment. Therefore, this evidence was of the utmost importance and the court should have granted appellant's motion to amend its answer to plead the invalidity of the aforesaid judgment based upon such lack of service.

See also, *DiTrapani v. M. A. Henry Co.*, 7 F. R. D. 123.

It Was Error for the Court to Grant a Judgment Based on an Invalid Judgment Obtained in the State Court.

The affidavit of Sam G. Richardson [R. 130-132] reveals that the said Richardson was in Fort Worth, Texas, on the date when the Sheriff's Deputy, R. W. Carter had supposedly served him in Los Angeles, California. In fact, said affidavit also showed that Sam G. Richardson had been in Fort Worth continuously from sometime before and after the said date of purported service upon him. In support of the said Richardson's contention are the affidavits of George E. Hosey, a Notary Public in and for the County of Tarrant, State of Texas, and the affidavit of Elizabeth Richardson, the mother of Sam G. Rich-

ardson. Clearly, if Mr. Richardson was in Fort Worth as these affidavits indicate, he could not have been in San Gabriel at the time Mr. Carter claims.

Furthermore, a review of Mr. Carter's affidavit [R. 160-161] shows that he personally did not know Sam Richardson and in fact purportedly served him after receiving information from a Mr. Halloway, who allegedly pointed Richardson out to the said Carter from "among a scattered group of three or four men in the Station." When we weigh the affidavits in support of Mr. Richardson's claim that he was in Fort Worth at the time of the claimed service upon him with the affidavit of Mr. Carter, we see that the latter affidavit fails to have the strength to absolutely and unequivocally establish service upon Richardson. Mr. Carter's affidavit of service becomes even weaker when it is considered that in one place the affiant claims to have served Mr. Richardson in a service station [R. p. 160] and in another place he claims to have served Mr. Richardson at 804 South San Gabriel Boulevard [R. p. 83]. 804 South San Gabriel Boulevard is a nursery. Add to this the fact that in considering a motion for a summary judgment the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence and we find that the value of Mr. Carter's affidavits have little, if any, value.

> See, *Ramsouer v. Midland Valley R. Co.,* 135 F. 2d 101, 106.

Reference is also made to those portions of Mr. Richardson's affidavit wherein he says that in the year 1946

he was 5′ 9″ in height, weighed 175 pounds and had straight hair, the color of which was light brown sprinkled with grey, with grey hair at the temples, and that he had not worn a mustache during the last ten or fifteen years. This information is indeed in sharp contrast to that found in the aforesaid affidavit of Mr. Carter wherein he says "Sam Richardson, 5 ft. 7 or 8 inches, 150-160 lbs., *black wavy hair, small mustache.*" (Italics ours.)

It is apparent from an examination of these opposing affidavits that Mr. Carter was mistaken in claiming that he had served Mr. Richardson since he was not in San Gabriel to be served.

It is fundamental that where there has been no service of process or if there has been invalid service of process the court never acquires jurisdiction and the judgment based on such service is VOID.

> *People v. One 1941 Chrysler Sedan,* 81 Cal. App. 2d 131, 183 P. 2d 707.

Since said judgment was void and not merely voidable, the trial court herein should not have given any effect to it.

> *Bower v. Casanave,* 44 Fed. Supp. 501;
>
> *Wyman v. Newhouse,* 93 Fed. 2d 313, 315.

In fact, it is well settled that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings.

> *Gonzales v. Tuttman,* 59 Fed. Supp. 858, 862;
>
> *Adam v. Saenger,* 303 U. S. 59, 58 S. Ct. 454, 82 L. Ed. 649.

It is significant that, in *Gonzales v. Tuttman, supra,* the court denied a summary judgment and said:

> "In the absence of essential facts concerning jurisdiction over the persons against whom the said judgments purport to run, the motion for summary judgment as to the second cause of action must accordingly be denied."

One of the primary essentials of the system of justice so long promulgated in our courts is the absolute requirement that every person have the right to protect himself when he is assailed in a court of law. It is manifest from the above that both Mr. Richardson and the appellant have been deprived of this right. The trial court herein erred when it failed to examine into the jurisdiction upon which the judgment was rendered in State court action No. 516890 and hold that by virtue of the lack of service upon Richardson the said judgment was void and could not have been a basis for any judgment in the Federal court. In any event whether Richardson was, or was not served in the State Court action was a disputed question of fact and should not have been decided by the trial court on the motion for a summary judgment.

Conclusion.

For the reasons hereinabove stated it is respectfully submitted that the trial court erred in the various particulars herein outlined and for the said reasons the judgment should be reversed.

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